

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARTON ANTHONY STROMSKI; and
JACKIE LYNN CLARK-STROMSKI

Civil No. 02-1636-CO

Plaintiffs,

FINDINGS AND RECOMMENDATION

v.

JOSH FINDLEY; JEFF GORDON; and
ROBERT KRIEGER

Defendants.

COONEY, Magistrate Judge:

Plaintiff Jackie Clark-Stromski has filed a motion to withdraw as party Plaintiff. (#29).

Defendants Findley and Gordon have filed responses indicating they have no objection. Defendant Krieger has not filed a response; the time for response has passed.

I. DISCUSSION

After a defendant has filed an answer or motion for summary judgment, an action may be dismissed voluntarily at plaintiff's request only by order of the court and "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). In the Ninth Circuit, "Although costs and attorney fees are often imposed upon a plaintiff who is granted a voluntary dismissal under Fed.R.Civ.P. 41(a)(2), no circuit court has held that payment of the defendant's costs and attorney

fees is a prerequisite to an order granting voluntary dismissal." Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989) (and cases cited); P.R. Maritime Shipping Auth. v. Leith, 668 F.2d 46, 51 (1st Cir. 1981) (cited with approval by Stevedoring Services) [district court did not abuse its discretion in granting voluntary dismissal without imposing costs and attorney's fees]; 9 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2366 (2d ed. 1995). Plain legal prejudice does not result to a defendant from the prospect of a second lawsuit or from a missed opportunity for a legal ruling on the merits, but may be shown where actual legal rights are threatened or where monetary or other burdens appear to be extreme or unreasonable. Watson v. Clark, 716 F. Supp. 1354, 1355-56 (D. Nev. 1989), aff'd, 909 F.2d 1490 (1990) (and cases cited).

A voluntary dismissal under Rule 41(a)(2) is without prejudice unless the court order specifies otherwise.

Plaintiff does not mention costs or prejudice in her motion. No Defendant has responded requesting costs, or requests that the case be dismissed by Plaintiff Clark-Stromski with prejudice.

The court finds that, in the circumstances, this action should be dismissed without prejudice, and without costs and fees.

II. RECOMMENDATION

For the foregoing reasons, plaintiff's motion to dismiss (#29) should be granted, without prejudice, and without fees and costs.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order.

The parties shall have ten days from the date of service of a copy of this recommendation within

which to file specific written objections with the court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 21 day of June, 2005.

/s/
UNITED STATES MAGISTRATE JUDGE